# APPENDIX

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## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**No. 09-1688**

**[Filed May 17, 2010]**

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| SUSAN M. FOX, *Plaintiff-Appellant,* | ) |
| *v.* | ) |
| TRAVERSE CITY AREA PUBLIC SCHOOLS BOARD OF EDUCATION, TRAVERSE CITY AREA PUBLIC SCHOOLS, CHRISTINE M. DAVIS, and ROBERT T. PETERS, *Defendants-Appellees.* | ) |

Appeal from the United States District Court for the Western District of Michigan at Grand Rapids.
No. 07-00956—Robert J. Jonker, District Judge.

Argued: March 9, 2010

Decided and Filed: May 17, 2010

Before: DAUGHTREY, GILMAN, and KETHLEDGE, Circuit Judges

## COUNSEL

**ARGUED:** Carl J. Marlinga, MARLINGA LAW GROUP, PLLC, Clinton Township, Michigan, for Appellant. William Vogelzang, Jr., KLUCZYNSKI, GIRTZ & VOGELZANG, Grand Rapids, Michigan, for Appellee. **ON BRIEF:** Carl J. Marlinga, MARLINGA LAW GROUP, PLLC, Clinton Township, Michigan, for Appellant. William Vogelzang, Jr., Mark T. Ostrowski, KLUCZYNSKI, GIRTZ & VOGELZANG, Grand Rapids, Michigan, for Appellee.

## OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. Plaintiff Susan M. Fox, a former special-education teacher employed by the defendant school system, appeals the district court's order granting summary judgment to the defendants in this First Amendment retaliation action brought under 42 U.S.C. § 1983. The district court held that the case is controlled by the Supreme Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and determined that, under *Garcetti*, the plaintiff's complaints to her supervisors about the size of her teaching caseload were not protected by the First Amendment. Specifically, the court held that the speech in question, if made by Fox at all, was made not in her role as a "public citizen" but as an employee, that it was made to her immediate supervisors, and that it did not address a matter of "public concern" but, rather, only the conditions of her employment. We agree, and we therefore affirm the decision of the district court.

## *FACTUAL AND PROCEDURAL BACKGROUND*

Fox was hired to teach at Blair Elementary School under a probationary contract for the school years 2005-2005 and 2006-2007. In February 2007, she was notified that her contract would not be renewed for the following year, based on documentation of numerous performance deficiencies dating back to early 2006. Those deficiencies included the failure to complete the required student Medicaid and IEP reports in an appropriate and timely manner, the unauthorized delegation of responsibilities to teaching assistants, and the failure to provide the minimum required instructional time to students. Fox's performance evaluations also indicated that the school had received complaints fromparents that she was making inappropriate recommendations regarding medications for her students. She had been informed of these problems in periodic meetings with school officials during her probationary employment.

Fox disputed claims that her performance was deficient and maintained that she was terminated for voicing concerns to her supervisors, Blair Elementary School Principal Robert Peters and Special Education Director Kim Urbanski, that the size of her teaching caseload exceeded that allowable by law. It is undisputed that during the 2005-2005 school year, Fox carried a caseload of no more than the legal limit of 21 students. In the fall of 2006, however, Blair Elementary launched a targeted reading program designed to improve the reading skills of both general and special education students. Fox volunteered to participate in the reading program but was relieved of that responsibility after only four weeks because,

according to Principal Peters, she was falling behind in her other responsibilities.

Fox maintained that her participation in the reading program had made her responsible for a total of 34 students in various classes, which by her calculation put her over the legal number of students to supervise. She further alleged that when she reported this non-compliance to Peters and Urbanski in September 2006, she encountered hostility that ultimately resulted in the notice of non-renewal she received in February 2007, almost five months later. Peters, on the other hand, denied that Fox had ever complained that her caseload violated the law at any time prior to the date he informed her that her contract would not be renewed. Fox conceded that she had never filed a formal grievance with her union. Moreover, nothing in the record indicates that she voiced concerns that her caseload was "illegal" outside the ordinary chain of command at her school.

Fox ultimately filed suit in federal court, alleging a violation of her right to free speech under the First Amendment and also seeking recovery under several state-law theories. The district court granted summary judgment to the defendants on the civil rights claim and dismissed the pendent state-law claims. The court held that Fox's statements to her supervisors were not entitled to First Amendment protection and, therefore, that even if she had been fired for making them, there was no violation of a clearly established right, as required by section 1983. Fox now appeals the district court's summary judgment order, arguing that there exists a genuine issue of material fact as to whether, in voicing her complaint about her caseload, she was

speaking as a public citizen entitled to First Amendment protection.

## *DISCUSSION*

To prevail in the district court on her claim of retaliatory discharge in violation of the First and Fourteenth Amendments, Fox would have had to show (1) that her statements were protected under the First Amendment; (2) that she suffered an adverse employment action; and (3) that "the adverse action was motivated at least in part as a response to the exercise of [her]constitutional rights." *Nair v. Oakland County Cmty. Mental Health Auth.*, 443 F.3d 469, 477-478 (6th Cir. 2006) (quoting *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 715 (6th Cir. 2001)). The district court determined that Fox failed to establish that her speech was protected and, therefore, that the defendants were entitled to judgment in their favor as a matter of law.

The parties agreed below that Fox's retaliation claim is controlled by the Supreme Court's opinion in *Garcetti*, as did the district court. Indeed, the district judge concluded, "It's hard for me to see, frankly, a clear[er] case of Garcetti applying in the context of a public employee's speech." We agree.

In *Garcetti*, the Supreme Court recognized that citizens who enter government service "must accept certain limitations on [their] freedoms," including limitations on the scope of their First Amendment rights. 547 U.S. at 418. Observing that public employees "do not surrender *all* their First Amendment rights by reason of their employment," the Court held that the interest of a public employee "in

commenting on matters of public concern" must be balanced against the interest of governmental employers "in promoting the efficiency of the public services it performs through its employees." *Id.* at 417 (emphasis added).

For a public employee's statements to receive First Amendment protection, the public employee must speak "as a citizen" and "address[] matters of public concern." *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 542 (6th Cir. 2007). "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." *Garcetti*, 547 U.S. at 421. Under *Garcetti*, "even employee speech addressing a matter of public concern is not protected if made pursuant to the employee's official duties." *Weisbarth*, 499 F.3d at 545. Thus, in reviewing a public employee's statement under *Garcetti*, we must consider both its content and context – including to whom the statement was made – to determine whether the plaintiff made the statement pursuant to her individual duties. *See id.*; *see also Haynes v. City of Circleville*, 474 F.3d 357, 362 (6th Cir. 2007).

Speech by a public employee made pursuant to *ad hoc* or *de facto* duties not appearing in any written job description is nevertheless not protected if it "owes its existence to [the speaker's] professional responsibilities." *Weisbarth*, 499 F.3d at 544 (quoting *Garcetti*, 547 U.S. at 421). In *Weisbarth*, for example, we concluded that a park ranger's statements about morale and performance issues to an outside consultant hired by the ranger department to assess these matters were made pursuant to her official duties, even though participating in the interview was

an *ad hoc* duty not described in the ranger's official job description. *Id.* at 543-44. Likewise, in *Haynes* we concluded that a police officer's memo to his superior officer expressing discontent about the financial cutbacks and changes to the canine-training program that he directed was not protected speech. *See* 474 F.3d at 365. The memo suggested that the cuts would open the police department to allegations of "negligence," "deliberate indifference," and "failure to train," *id.* at 360, but the plaintiff officer conceded that the new program complied with Ohio law. *Id.* at 365. In concluding that the plaintiff made these statements as a public employee rather than a private citizen, we cited the officer's involvement with the canine training program and the fact that he made the statements "solely to his superior." *Id.* at 364. The memo, therefore, communicated "nothing more than 'the quintessential employee beef: management has acted incompetently.'" *Id.* at 365 (quoting *Barnes v. McDowell*, 848 F.2d 725, 735 (6th Cir. 1998)).

Like the employee statements at issue in *Weisbarth* and *Haynes*, Fox's statements were made as a public employee rather than as a citizen and, therefore, do not merit First Amendment protection. As in *Haynes*, Fox's complaints were directed solely to her supervisor, not to the general public. She argues that because she did not control the number of students assigned to her class, her complaints about class size cannot have been made pursuant to her official duties. But the canine-training program administrator in *Haynes* did not control the level of funding allocated to his program, and yet we concluded that he made these statements as an employee rather than a citizen. It is clear – without any intricate parsing of Fox's job description – that her complaint about class size "owes

its existence to" her responsibilities as a special education teacher. *Weisbarth*, 499 F.3d at 544.

Nor, despite her contention to the contrary, is Fox aided by our opinion in *See v. City of Elyria*, 502 F.3d 484, 493 (6th Cir. 2007), in which we held that a city police officer's statements to the FBI alleging corruption within the city police department were constitutionally protected as a matter of public concern. Because the plaintiff officer reported his employer's illegal acts to an outside law enforcement agency, rather than solely to his supervisors, we held that those statements were obviously not made pursuant to the plaintiff's official duties. *Id.*

Fox next urges us to look beyond our own circuit precedent to the decisions of our sister circuits decided in the education context. However, our post-*Garcetti* decisions in *Weisbarth* and *Haynes* are controlling and, as indicated above, fully support the district court's grant of summary judgment, even though neither case arises in the context of education. Moreover, the out-of-circuit cases on which Fox relies, *Posey v. Lake Pend Oreille School District*, 546 F.3d 1121 (9th Cir. 2008),[1] and *Cioffi v. Averill Park Central School*

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[1] In *Posey*, the court found that there was a genuine issue of material fact as to whether the plaintiff, a security officer at a public high school, spoke as a public employee or a private citizen and reversed the district court's grant of summary judgment to the defendants on plaintiff's First Amendment retaliation claim 546 F.3d at 1129. The security officer wrote a letter to the school district chief administrative officer, superintendent, and other district administrators describing drug and weapons violations at the school and the principal's unresponsiveness to safety problems. *See id* at 1124 The plaintiff "wrote the letter at home,

*District*, 444 F.3d 158 (2d Cir. 2006),[2] are irrelevant to our analysis in this case, because both Posey and Cioffi, the plaintiff employees, made statements outside the ordinary chain of command and, therefore, their speech did not involve – as here – statements made by a public employee only to her immediate supervisors. Of more immediate pertinence to Fox's claim is the Fifth Circuit's observation that "[c]ases from other circuits are consistent in holding that when a public employee raises complaints or concerns up the chain of command at his workplace about his job duties, that speech is undertaken in the course of performing his job." *Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008).

Finally, we reject the plaintiff's contention that the district court erred in treating the constitutional status of her speech as a matter of law, rather than a question of fact for a jury. Prior to the issuance of its decision in *Garcetti*, the Supreme Court treated "the

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with his own resources, on his own time, and of his own initiative," and following the letter he met with school district officials at his home outside school hours to discuss his concerns. *Id.*

[2] In *Cioffi*, the court, anticipating the Supreme Court's forthcoming ruling in *Garcetti*, held that the plaintiff teacher and athletic director spoke as a citizen rather than a public employee when he made statements about a hazing incident at his school. 444 F.3d at 167 n.3. The school district uncovered incidents of hazing and sexual assault among the members of the football team, acts for which several students and teachers were arrested. *See id.* at 161. The plaintiff wrote a letter to the superintendent and school board and held a public press conference criticizing the football coach's supervision of the team and the school district's response to the incident. *Id.*

inquiry into the protected status of speech [as] one of law, not fact." *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983). In *Garcetti*, however, the Court held that the question of whether a statement was spoken as a public employee or as a private citizen for First Amendment purposes was "a practical one," requiring a fact-specific inquiry into the "duties an employee actually is expected to perform." *Garcetti*, 547 U.S. at 424-25. Unfortunately, whether the Court intended to retreat from the rule in *Connick* is not altogether clear from the language in *Garcetti*.

As the plaintiff correctly observes, the circuits are divided over "whether the inquiry into the protected status of speech remains one purely of law as stated in *Connick*, or if instead *Garcetti* has transformed it into a mixed question of fact and law." *Posey*, 546 F.3d at 1127. The Third, Seventh, Eighth, and Ninth Circuits have concluded that "whether the speech in question was spoken as a public employee or a private citizen presents a mixed question of fact and law." *Id.* at 1129; *see also Reilly v. City of Atlantic City*, 523 F.3d 216, 227 (3d Cir. 2008); *Davis v. Cook County*, 534 F.3d 650, 653 (7th Cir. 2008). Other circuits have stated that this remains a "question [] of law for the court to resolve." *Wilburn v. Robinson*, 489 F.3d 1140, 1149 (D.C. Cir. 2007); *see also Charles v. Grief*, 522 F.3d 508, 513 n.17 (5th Cir. 2008) ("even though analyzing whether *Garcetti* applies involves the consideration of factual circumstances surrounding the speech at issue, the question of whether [the plaintiff's] speech is entitled to protection is a legal conclusion properly decided at summary judgment"); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1202-03 (10th Cir. 2007) (district court is to determine "whether the employee speaks 'pursuant to (his)

official duties'," "whether the subject of the speech is a matter of public concern," and "whether the employee's interest in commenting on the issue outweighs the interest of the state as employer").

This circuit split is, however, ultimately irrelevant to the disposition of this case. In our post-*Garcetti* opinions we have consistently described the question of whether, in a First Amendment retaliation action, a public employee's speech is protected as one of law, not one of both fact and law. *See Haynes*, 474 F.3d at 362 (citing *Taylor v. Keith*, 338 F.3d 639, 643 (6th Cir. 2003) (public employee "must show that, as a matter of law, the speech at issue was protected"); *See*, 502 F.3d at 492 (citing *Connick*, 461 U.S. at 148 n.10) (whether an employee's speech is protected "is a question of law for the court to decide").

Moreover, in granting summary judgment in this case, the district court took as true all of the plaintiff's factual allegations. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. at 587 ("Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'"). The statements that Fox argues should receive protection under the First Amendment were made to her immediate supervisors at the school, and she does not dispute that the number of students assigned to her was directly related to the conditions of her employment. Even if the question were purely a question of fact, therefore, the district court properly granted summary judgment because the factual record presents no genuine issue for trial.

## *CONCLUSION*

For the reasons set out above, we conclude that the district court correctly determined that, under *Garcetti*, when the plaintiff complained to her supervisor about the number of students assigned to her supervision, she spoke as a public employee rather than a private citizen. As a result, her statements were not entitled to protection under the First Amendment, and her retaliation claim was properly dismissed upon entry of summary judgment in favor of the defendants. The judgment of the district court is, therefore, AFFIRMED.

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**No. 09-1688**

**[Filed May 17, 2010]**

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|---|---|
| SUSAN M. FOX, | ) |
| Plaintiff - Appellant, | ) |
| | ) |
| v. | ) |
| | ) |
| TRAVERSE CITY AREA PUBLIC SCHOOLS BOARD OF EDUCATION, TRAVERSE CITY AREA PUBLIC SCHOOLS, CHRISTINE M. DAVIS, and ROBERT T. PETERS, | ) |
| Defendants - Appellees. | ) |
| | ) |

Before: DAUGHTREY, GILMAN, and KETH LEDGE, Circuit Judges.

**JUDGMENT**

On Appeal from the United States District Court for the Western District of Michigan at Grand Rapids.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

**ENTERED BY ORDER OF THE COURT**

/s/Leonard Green
Leonard Green, Clerk

## APPENDIX B

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**Case No. 1:07-CV-956**

**[Filed April 24, 2009]**

| | |
|---|---|
| SUSAN M. FOX, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| TRAVERSE CITY AREA PUBLIC SCHOOLS, et al., | ) |
| | ) |
| Defendants. | ) |

HON. ROBERT J. JONKER

**ORDER**

This matter is before the Court on Plaintiff's First Motion in Limine (docket # 68) and Defendants' Motion for Summary Judgment (docket # 71). The Court heard oral argument on the motions on April 23, 2009. (*See* docket # 73.) Based on its review of the record, and for the reasons stated in detail in the hearing, the Court concludes that there exists no

genuine issue of material fact and Defendants are entitled to judgment as a matter of law.

**ACCORDINGLY, IT IS ORDERED.**

1. Defendant's Motion for Summary Judgment (docket # 71) is **GRANTED**; and
2. Plaintiff's First Motion in Limine (docket # 68) is **DISMISSED AS MOOT**.

This case is **CLOSED**.

Dated: April 24, 2009

/s/ Robert J. Jonker
ROBERT J. JONKER
UNITED STATES DISTRICT JUDGE

## APPENDIX C

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**No. 1:07-cv-0956**

**[Filed May 26, 2009]**

| | |
|---|---|
| SUSAN M. FOX, Plaintiff, | ) |
| vs. | ) |
| TRAVERSE CITY AREA PUBLIC SCHOOLS BOARD OF EDUCATION, TRAVERSE CITY AREA PUBLIC SCHOOLS, CHRISTINE M. DAVIS, and ROBERT T. PETERS, Defendants. | ) |

TRANSCRIPT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BEFORE THE HONORABLE ROBERT J. JONKER UNITED STATES DISTRICT JUDGE GRAND RAPIDS, MICHIGAN April 23, 2009

Court Reporter: Glenda Trexler
Official Court Reporter
United States District Court
685 Federal Building

110 Michigan Street, N.W.
Grand Rapids, Michigan 49503

Proceedings reported by stenotype, transcript produced by computer-aided transcription.

* * *

[p.38]

Rights Act does not encompass the Rehabilitation Act. That would be like saying just because there's a tort violation we've alleged all torts.

I would submit that's an unreasonable explanation. I also believe we submitted some Requests for Admissions that -- asking them to define what civil rights they were claiming, and I don't believe there was any reference to Section 504 of the Rehabilitation Act in those responses.

But at any rate, I think it's patently unreasonable to claim that you can just allege civil rights and that's going to include every possible statute that might provide you with a remedy. Thank you, Your Honor.

*THE COURT:* Okay. Anything else from either of the parties?

*MR. MATHIEU:* No, Your Honor.

*THE COURT:* Okay. Well, I appreciate the presentations. They are certainly thorough, and obviously both sides have been completely represented in their respective filings and in the argument here today.

I am going to go ahead and give you my ruling today because I think I'm well enough prepared to do that without further delay. And because at least the way I see the case, the admitted large pile of facts and some factual disputes turns out not to be controlling. At least in the Court's view on the First Amendment case, Garcetti is controlling and calls

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for me to grant the defense motion, and I'm going to also grant the defense motion on the whistleblower and public policy claims based on the statute of limitations. And those are issues that I think don't require a lot more factual development or analysis for me to do, so I'll just give you the ruling here.

Let me start, though, with the Section 504 Complaint or request that that be the Complaint and to dispose of that, because I don't believe that's in the case. So to the extent the plaintiff is seeking to do that here, I'll deny that. And I'll tell you why I don't think it's in the case.

This is an issue that to some extent was embedded in what was presented to the magistrate judge. The request was to have leave to file an Amended Complaint which the magistrate denied by order dated I think October 9, 2008, for a variety of reasons. And certainly 504 is not specifically mentioned in there, and there's no suggestion that he's denying the motion because he thinks 504 is already in the case.

And then on December 18, 2008, the magistrate judge entered an order striking the plaintiff's Amended Complaint based on his earlier ruling and

specifically saying, We're going to go ahead on the original Complaint minus Counts IV and V.

Count I of that original Complaint entitled a violation of Civil Rights Act is what the plaintiff asserts

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today is the source of the 504 claim, but I think that even under the most liberal reading possible of that count, it's not conceivable that 504 is in the case.

Certainly 504 could be characterized generally as a Civil Rights Act, but when I read the operative paragraphs of Count I, there's no reference at all to anything like Section 504. Instead I see repeatedly 30 and 31 paragraphs in particular that we're talking about plaintiff's constitutional rights of free speech and association in reporting the suspected violation of Michigan law. And paragraph 31 again referencing -- or Fourteenth Amendment protection presumably incorporating then what it says in the last line as a lawful exercise of the plaintiff's rights of free speech and association, again the First Amendment claims. It's repeated again in 32. And there's no -- and 33 as well. And there's no reference at all to anything that I think could remotely be construed as a Section 504 claim. So to the extent there's any kind of a new request for that, I'd deny it. I just don't think it's in the case at all. And if the case goes up, I think the parties will have to figure out if there was something else in front of the magistrate judge that compels a different result, but I do know that the two orders I mentioned are silent on it as I read them, and they weren't appealed in any event, and at this point after discovery

is closed and briefing has been done, it's really too late to open the door

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to a brand-new theory of relief. So to the extent that 504 is an issue today, we'll leave it.

The motion in limine does have some interesting issues to me, but I'm going to put that to one side based on my view of what the dispositive questions are on the public policy and whistleblower and First Amendment claims. So I don't think I need to make a ruling on that. I'll just dismiss that as moot in light of where I'm going with the rest of the case.

Let me deal with the public policy and whistleblower claims first. First of all, I really think they amount to one in the same claim effectively and have to be analyzed under the Whistleblower Act. Dolan against Continental Airlines, 454 Mich 373, indicates from the Michigan Supreme Court that the Whistleblower Act is the exclusive remedy in a case like this for claims that somebody was subjected to adverse action in an employment setting based on the exercise of First Amendment rights reporting violations of law or alleged violations of law. So they merge into that statutory claim. And the statute has a 90-day limitations period.

The question is: Where does that 90 days run from? Is it the last date, June 30, 2007, on which the plaintiff says she was effectively employed? Or is it some earlier date, either the date of notification that she wasn't going to get a new contract and could have the

opportunity to resign instead, February 27, 2007? Alternatively, the March 12 date when I

[p.42]

think the board accepted that resignation? Conceivably even the June 20, 2007, date, which was the last date of her contract, or I suppose the June 13 date which was the date she last worked actually physically at the school.

The only potential date that would save the claim here which was filed on September 25, 2007, is the June 30 date. And I don't think that works in this case for a number of reasons.

I actually think under Delaware State College against Ricks, which is the United States Supreme Court case that's discussed in the briefing, that the appropriate date for purposes of an action accruing under the act is the date the person has notice that the adverse employment action either has occurred or is inevitably occurring. In Delaware State College the facts were a little different and involved, as I recall, a tenured faculty member who was -- actually somebody who wanted to be tenured and who was denied tenure. It was ultimately going to result inevitably under the policy of that college in the person getting a one-year terminal contract and then out. And the Supreme Court in that case had no trouble saying that the accrual date was that date when the person got notice that his days were numbered, so to speak, at the college.

In fact, the Supreme Court says that ". . . when that mere continuity of employment without more is

insufficient to prolong the life of a cause of action for employment

[p.43]

discrimination." That's quoting directly from the Supreme Court.

Now, it's not a State of Michigan case, that's true, but I think that the same kind of policies are in play and that once the person is on notice of an unequivocal adverse action, such as the plaintiff in this case, that, you know, it's time to start counting the 90 days. At the absolute outside it seems to me the end of the contract date, June 20, 2007, would have to be the end of the line. There's no dispute, at least in the contract which is Exhibit A to the defense brief, the contract date terminates June 20, 2007, and it seems to me whether there were any accrued vacation or any other reason administratively that somebody would be carried for a time up to June 30 in this case on the books of the school system, it really doesn't change the fact that clearly the contract is over and that there's not going to be a new one. So that the absolute outside date, it seems to me, would be June 20. And under any scenario then there would be no possibility of surviving the 90-day statute of limitations here.

The defense brief also includes a case from the Michigan Court of Appeals, Parker v. Cadillac Gage, which deals with a discriminatory tort, a discharge case, and in that case it's the actual last day worked that controls for purposes of the act involved there, and that subsequent severance, vacation pay, or otherwise doesn't affect it.

[p.44]

If you look at the last day worked, I think on the undisputed record here it would be June 13. And, again, the 90 days would have expired. But the Court's finding is that the appropriate time to start counting is that notice date, as it was in the Supreme Court's case in Delaware State College. But even reading the most liberal possible interpretation that I would see on this record would be no later than June 20, 2007. And in either case, the statute of limitations then would bar the claim.

That would leave the First Amendment retaliation claim, which is the one that I think I've spent the most time talking about in oral argument and that in the Court's view really rises and falls on the application of Garcetti, the Supreme Court's relatively recent case involving speech and public employees. And I think it makes no bones about stating that public employees do have more limited rights than other citizens when it comes to potential discipline or adverse action for speech.

So let's assume for purposes of the analysis here, and only for purposes of the analysis, that what Ms. Fox says she told her supervisors is what led to the adverse action. I'm making no finding on that. I'm saying let's assume for purposes of the summary judgment analysis that happened.

It seems to me that under Garcetti you have to find that the speech in order to be protected under the first

[p.45]

element of the prima facie case would have to be made as a citizen and on matters of public concern, and I think this falters on the "as a citizen" prong of Garcetti, just as I thought in the Meggison case that the plaintiff's claim faltered on the same prong.

There's no dispute here that the statements that Ms. Fox said she made to her supervisors involved directly her complaints about workload. She said, "I shouldn't have this number of people. It's not appropriate under the law." And it related directly to the special ed students in her charge.

It's hard for me to see, frankly, a clear case of Garcetti applying in the context of a public employee's speech. It's certainly within the fair scope of her responsibility as a teacher to communicate with her supervisors on workload. That's what, in part, a teacher would do in any case, whether they thought there was a violation of law or otherwise, or if they thought there was somebody in the class that needed special attention or that required some other special arrangements that affected the overall load on the teacher and the potential for impact on other students.

It certainly falls within the policy concern of Garcetti that the administration or the government as employer have greater flexibility than the government as a sovereign, so to speak, to regulate speech, to make judgments about how to run its business or its school system in this case. And so

[p.46]

even though you look at some of the cases including those cited in Garcetti and then in the Meggison case that I later authored and you say, Wow, it's sort of odd to invite somebody in the one case -- and I don't remember the name of it -- but to invite somebody to have a conversation with a consultant for the purpose of improving the employment setting and then terminate the person for what the employee said to the consultant, and yet that clearly fell within Garcetti. In the case of the K-9 officer, there was also direct communication about what was involved in the K-9 officer's job

The Garcetti opinion itself, as the plaintiff's counsel points out, has a reference near the end of the majority opinion to a response to Judge Suter's dissent in the context of education. And one of the things Justice Suter was concerned about was that academic freedom could be somehow impaired in applying Garcetti as the majority wrote it, but I think that however that may play out in the future, this isn't one of those cases.

The example, as I recall, involved teaching at the college level where academic freedom may be at its highest value. And in responding, at least I don't read the majority to say, Well, we're going to carve out a Garcetti exception. To the contrary, they say maybe there's something else, some other First Amendment value or line of cases that would apply or address that situation, but we'll leave that to another day.

[p.47]

And I'm reading toward the end then of that majority opinion when they directly address Justice Suter. "There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this court's customary employee-speech jurisprudence. We need not and for that reason do not decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."

I think in the context of that statement and Justice Suter's critique and the dissent, we're really talking about something different than a person in the secondary education setting or below who is talking about workload and IEPs for special ed students. I think we're talking there about the need to allow people who have unorthodox views, at least in some academic settings, to present them as a matter of preserving academic freedom and avoiding some government-enforced orthodoxy. However far that may go. And we all read in the papers about issues at school district levels, admittedly secondary ed, involving creationism and evolution, who is going to get to decide? Is it going to be the parents? Is it going to be the school board? Is it going to be the teachers? Whatever issues there may be with respect to curriculum content -- and I think that's the broadest reading you can give this exception -- we are not talking about

[p.48]

curriculum content but the management of employees, the allocation of resources, the level of a student load. Those strike me as core Garcetti-protected functions of management And it's all about protecting the management's ability to run the school district in this case, and I don't see that potential refinement to the Garcetti analysis or addition to the Garcetti analysis as in play here on these facts.

So I think that when I look at Garcetti, laying aside what happened here, there's no possible way to conclude anything other than that the statements Ms. Fox says she made were made within the scope of her employment and pursuant to her employment as a special ed teacher, and for that reason even if that's what led to her adverse action here, and nobody is disputing that it was adverse action, then it's not First Amendment-protected speech and not a basis for a First Amendment claim.

So based on those thoughts, I'm going to grant the defense motion which would lead to dismissal of the case in its entirety, and we'll enter an Order to that effect and reference this decision, and then the parties can take it where it needs to go. Or if Mr. Mathieu thinks there's a new case in the offing, he's free to pursue that too. And I'm sure we'd have, you know, claim-preclusion issues and whatnot else, but I have no doubt that counsel on both sides will be able to manage whatever the sequelae of this Court's decision is.

[p.49]

Any questions before we break? Mr. Mathieu?

*MR. MATHIEU:* Nothing, Your Honor.

*THE COURT:* Mr. Ostrowski?

*MR. OSTROWSKI:* No, Your Honor.

*THE COURT:* Okay. Thank you.

*MR. VOGELZANG:* Thank you, Your Honor.

*THE CLERK:* All rise, please. Court is adjourned.

*(Proceeding adjourned at 4:16 p.m.)*

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Date: May 26, 2009

**/s/ Glenda Trexler**

Glenda Trexler, CSR-1436, RPR, CRR

## APPENDIX D

## AFFIDAVIT OF SUSAN M. FOX

### Background

I was hired as special education teacher by TCAPS for the 2005-2006 school year with between 14 and 17 students on my caseload. In that year Robert Peters complimented me on numerous occasions as to my effectiveness in providing a creative and sound instructional setting for my students. There were no problems with scheduling, homework folders, or negative comments. I heard wonderful comments from the teachers about how well the students were doing, from my special education supervisor, Ms. Kim Urbanski, complimenting my homework books and daily parent involvement; stating to me, "If all teachers would use these books, students would do so much better." Parents of my students were telling me their children were learning for the first time. The evaluations dated 11/29/05, 3/7/06, and 3/23/06 reflect this. Peters stated, in his final evaluation: "Her transition following the hiring process was very minimal, yet she worked hard since her feet hit the ground". This statement and others reflected I needed very little support.

In the fall of 2006, I was given the assignment to service 21 SPED students on my caseload which is the maximum number of students allowed. In addition, I was given another assignment to leave my classroom to teach a reading program called "READ 180".

However, in order to implement this program both state and federal rules and regulations require that school board and the principal include the READ 180 program into each student's Individualized Program Plan (IPP). Nothing was done over the summer by the administration to do this. The administration failed to provide a plan pursuant to R340.1832(1)(c) detailing how my students would receive IEP requirements with the new Read 180 general education program; this, notwithstanding an email dated June 16, 2006 from Jim Paris with the Compliance Office at the Michigan Department of Education stating how to legally assign a special education teacher for the Read 180 program.[1] This e-mail was sent to Terry Sheldon, the Read 180 grant administrator for TCAPS by Rick Bechtold (TBAISD monitor).

This added 13 more SPED students, taking my caseload to 34 students in violation of Michigan law and added 90 minutes of teaching per day. Also, because the program took my time away from my students my caseload maximum was required to be reduced proportionately, i.e. 15 students. Further, within my caseload I had three Level 3 behavior students, i.e., students with very severe emotional and behavioral problems. Level 3 students require one-on-one help in small settings with very structured programs. These students refuse to follow directions, complete assignments, pick on peers, threaten others, break things, throw objects, leave the room, sleep in the classroom, won't accept responsibility for their actions/behavior, instigate fights among peers and

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[1] See Ex G in Plaintiff's Brief in Opposition to Motion For Summary Judgment

often have a history of aggressive behavior at school and home.

**Out of Compliance**

Because this assignment was unlawful and virtually, physically impossible to fulfill. I complained to Robert Peters beginning on September 7th I advised him that the program was out of compliance and unlawful. I told him that leaving the classroom prevented my 21 students from getting their SPED rights by the IEP. Peters was disgusted with me going to him repeatedly. He did not understand that removing me for 90 minutes a day to teach in the GE program was preventing me from fully servicing my 21 SPED students.

My first indication that something was happening was when my aide told me that she was being questioned by Peters as to what she was doing in my class. He never came to me or discussed any issues regarding her with me. In February 2007 for the first time I learned that he was saying that I misused her time; this, although I used her exactly as I had in the first year, without complaint.

Overall I went to him with these complaints 6 times in the month of September. Each time he ignored me and became increasingly hostile.

I also called the Supervisor of Special Education, Ms. Kim Urbanski, on September 15 and September 18 and advised her of the problem-she told me "It is a building level problem Susan, take care of it there." Finally, on September 19, 2006 I insisted that she come over to Blair and sit down and look at the laws

vis-á-vis the READ 180 program. At the time Ms. Urbanski was overworked and frustrated because there was no leadership at the executive level since the Special Education Director's position was unfilled, however, she was knowledgeable in special education laws and I thought she would be helpful. My concern was for the students and the possibility of a lawsuit by the parents because their children's IEPs were not being followed. Her response to this third phone call was direct and abrupt: "Susan, don't you worry about the laws, you worry about your caseload." On September 22nd she finally came to the school and met with principal Peters in a closed meeting. I knew Kim was in the building because Peters came down to get the teachers caseload IEP's. He was furious and asked for the "Red Book" (student IEP's). He obviously knew I had called the supervisor. I expected to be called down at some time to meet with them. I expected to hear a "thank you" and affirmation that I did the right thing. I expected to hear an apology for that first month. I understood that everyone was under pressure with no executive director of SPED, however administration should have recognized this enormous risk they were taking. I was not called down to the meeting. This was not like Kim my first year. She always stopped to say "hello". On September 25th Robert Peters called me into the office the following Monday morning. He was angry and told me that "he had to" take me off READ 180 and reschedule the classes. Everything changed after this meeting. The retaliation against me was immediate and took many forms.

## Initial Retaliation-False Accusations of Overdue IEPs

Robert Peter's initially began by telling others including administration that I was overdue with my IEPs and 30 day placements. I was not. He continued with a succession of notes in my mailbox, "overdue". When I would use my lunch hour time to gather the documents and show Peters the truth that they were not overdue he was dismissive and continued to falsely report to administration, "overdue". The IEPs were not "overdue"; unless Peters canceled, other administrators canceled or a parent canceled, He was angry when I "tabled" the IEP for lack of information, team members were absent; questioning and insinuating that I had control over "missing paperwork, team members". Tabling an IEP is legal and common with students who have an enormous amount of history. He refused to discuss these allegations and completely ignored any explanation offered.

Peters ignored a dangerous incident when a severely impaired level 3 student left my classroom while I was alone with 11 other students. I called the principal for help. There was no answer so I left a message. Now I learn from his testimony that he was in his office listening to my message and simply ignored me. In February 2007 when I was terminated he stated, as well as in his testimony, that this was an example that I was unable to handle my schedule.

Robert Peters subjected me to unusually excessive monitoring, micro-managing, recording, listening for any little piece of information to write about me (negative only).

After October 2 Peters told me on different occasions that looked "awful". I felt this was inappropriate. This was a significantly different attitude the first year.

In late October Robert Peters assigned Terry Sheldon to one of my classes supposedly as a support. Not until this litigation did I learn that she prepared a document highly critical of the reading program. This "support" was from an unqualified person who had no training or experience with special education students; in fact it would be illegal for her to teach this class. I subsequently learned in February of 2007 that Peters listed as a "concern" that I was using outdated reading materials. He did not tell me this in October; he only asked me to change the program-which I did immediately. Note that this program used materials he bought the year before and was the same program I used the year before without complaint.

**November Meeting**

I received and an e-mail note in my mailbox on Friday, November 10, 2006. Robert Peters was requesting a November 13 meeting in his office; he invited Kim Urbanski and John Scrudato. We were to discuss concerns and evaluation goals for me to focus on during this current evaluation cycle. I was looking forward to the meeting (since I never had the September 29 goal meeting required by the contract). I caught Bob in the hall Friday and asked if we were going to be discussing my goals that I had turned into him September 29? He said to bring them. I was pleased that Kim Urbanski and John Scrudato would be there for me. The students and staff had a very difficult first month with scheduling students support

time and with me out of my special education classes 90 minutes a day for READ 180. Kim Urbanski knew that this is what took place that first month. I felt because of this, she wanted to be at this "goal meeting" because of what happened that first month with the SPED students and program at Blair. I felt Kim would validate and help Bob with any special education issues and laws. As union president, John, would validate contractual issues, since Peters had overloaded me the first month. I knew Kim understood why I had to be removed from Read 180; I felt she wanted to be at this meeting to make sure the SPED students were protected since it is her responsibility. I looked at this meeting as an opportunity to create a fresh start and clear the air of unresolved issues.

When I arrived, I again handed Peters my 2-page goal document dated September 29, 2006. I was "upbeat"; relieved to have others' present to document this meeting.

Peters handed me his list of "Evaluation Goal Areas for 2006-2007". He said at this time, that he could not recommend me for Tenure if these goal areas were not addressed. I said, "No Problem, I am doing all these now. I can prove this". When I said this – Bob Peters paused, looked at Kim then changed the entire subject to Kim's new car; discussing her new car at great length, while I sat there and listened. There was virtually no discussion of either my goals or Peter's. However, I was not worried because I was doing all the 8 bullets. I was not worried because there were 2 other adults in the room to validate the list he handed me. Also, this was a casual list; not a formal Individual Development Plan as required by the collective bargaining contract.

As to the 8 bullet goals Robert Peters handed me:

1. Implement district curriculums [Proof: See student daily HW books sheets with Guided Reading, Read Natural, 180 HW; Blair cupboard: SRA PHONICS, Explode the Code, Modem Curriculum Press, COVE -- digraphs 1 & 2, Qualitative Reading Inventory, Angling for Words, Quick Reads, Project Read, Rigby Leveled Books, and many more].

2. Conduct/coordinate student assessments (PLAPF, goal progress) [Proof: See student Progress Reports, and individual PLAPF].

3. Support general education assessments (CAAP, MEAP, NAEP) [Proof: See individual student CAAP completed with me. teacher 'Key", Speak with students, teachers, aides with me during the MEAP, see HW sheets with MEAP "readiness" to parents preparing for students for good rest and healthy breakfast each day of the MEAP; ask students what "healthy snacks" I provided in the rooms with MEAP students, what room?, NAEP, See Henry Hafer, Administrator from NAEP, and my requested meeting to make sure my students individual "accommodations" were written before this very important National Exam. Speak with the NAEP people, who were "highly complimentary of my student's behavior, my responsibility to give them breaks, healthy snacks, with ice water and a slice of lemon.]

4. IEP/MET deadlines met [Proof: The MET is not my responsibility, IEP deadlines were met, unless a parent canceled illness, Peters canceled (TW), or

"other" administrator canceled, re: first year lawsuit took priority to AM's scheduled IEP.]

5. Other Special Education paperwork deadlines met [Proof: "What other?" Medicaid? My Medicaid was on time. I was continuously communicating, with the Medicaid Director, Ms. Deb Johnson. Deb understood the added workload first year; serving on TCAPS lawsuit; (requiring me to be gone from the classroom 23 days which meant substitutes for 23 nights). She understood the number of students we had receiving Medicaid, at Blair. Bob Saunders and I each had 17 Medicaid students as opposed to other schools who had 3-4. Ms. Johnson would tell me, "Susan, don't worry about them getting to me right now; your Medicaid are prepared so beautifully. Many TCAPS teachers do not call Deb Johnson. She does not receive them until summer. I have heard that some teachers refuse to do them at all because of the extra paper burden. It is not part of the job description. I would never deny this to my district, however I would ask for more time; particularly when I am giving "more of my time" to serve on their lawsuit (never disclosed to me at the lime of the interview), and the second year – extreme overloading all September; spilling over to fall due to students not able to handle continuous changing schedules.

6 IEP service times met – [Proof: Read 180's GE assignment 13 additional SPED students for 90 minutes daily. Servicing 21 + 13 SPED students daily = 34 SPED students. Reducing time to 2/3 a day for 21 SPED students ranging in grades first – sixth. These 21 students had multiple disabilities with 3 of the very severe behavior students requiring many unsafe, defiant, eloping behaviors. These students required

almost all day with me. The Problem: The GE Read 180 took 90 minutes daily reducing my teaching time. Legally 4 of these students were not receiving their Procedural or Substantive rights by law at this time. Robert Peters was resistant, would not listen, look at, and check into. It was Susan's fault; as told administration, "She wanted to do, but changed her mind". TRUTH: No administrator looked at the Grant to properly implement this legally for the students, and for the teachers "as the chosen staff" to teach this GE program. See student schedules around specials, lunch, recess, library, etc. After READ 180, scheduling could not be done "overnight". Student needs, appropriate groupings for safety to learn took some time around 12 teachers, 6 grade levels, and multiple disabilities. Parents consulted for permission to re-schedule for "appropriate" groupings. Minutes kept track of and made up.

This is why I kept going to Peters, Urbanski, Scrudato, and State of MI. Peter's statements at this time demonstrate the intensity and worry I was feeling. Robert Peters states that I was "Hyper-focused on student support time.; Concerns about student scheduling,/support times.; Can't change staffing formulas, laws, processes, paperwork.; Settle down – relax.; Student needs determine goals and support time.; Focus on students and things you can effect change in". In essence he was complaining that I was too worried about delivering the special education resources mandated by their IEPs. Principal Peters' solution: "stop homework books". However, Homework Books were never the problem. Peters felt if you get rid of the Homework Books- that will release the aide to go out and service more students. This was illegal. The aide was not lawfully qualified to teach for minutes. It

was the minutes to service students that were missing. It was also illegal to not work on the IEP goal written.

**Final Retaliation-February 27, 2007**
**Termination Based on False Concerns and Supports**

On February 27, 2007 I was shown a document entitled "Supports and Concerns" prepared by Robert Peters. This document came as a complete surprise to me. The so-called "supports" were mandatory professional development days and in-service training as required by the state of Michigan. These in-service days were not exclusive to me, but were required by all staff, or all SPED teachers at the school level or district level.

In his "concerns" and testimony Peters states that he met with me March 3, 2006, and March 8, 2006 regarding various problems. This is untrue. I did not meet with him on those days nor were any these issues discussed. As an example on March 8th he states "Again told to stop using homework notebooks due to amount of time needed to support this-aide time." Compare these false statements to the evaluation in my employee file prepared by Robert Peters dated March 23, 2006 (see Ex. A, in Brief) which states "She works to accomplish this involvement with daily homework books that are filled out at school, reviewed daily with the students, and sent home for review at the end of the day. Often notes are written to parents within the homework books for parent review."

Obviously, he did not tell me to stop using these-in fact he praised their use. The books were part of the presentation in my initial interview when I explained

their effectiveness in achieving student goals and objectives as it relates to "personal responsibility and work completion". The interviewing committee enthusiastically received these books and Peters was well aware of the intended use of these books to meet goals and objectives of the IEPs. In fact all of my students' IEPs which were signed and approved by Peters state: "Will use a homework book daily, filled out by the teachers, taken home, checked by mom nightly; returned each a.m. for the teachers to check". This mandates their use by law. He further states in the evaluation "Her transition following the hiring process was very minimal, yet she worked hard since her feet hit the ground here."; Mrs. Fox has demonstrated the ability to provide a sound instructional setting for her students within her classroom. She had collaborated creatively with our K-2 Special Education Teacher and several general education teachers..."

Peters list of "concerns" dated September 25, 2006 states that I was unable to handle my caseload. As stated above my caseload was both legally and physically impossible to achieve. Peters features the caseload adjustment as an accommodation to me when in fact he obviously was told that they were in violation of the law and for that reason alone the caseload adjustments were made.

He also states that there was "an inability to schedule properly and to use my aide correctly". Robert Peters was under the misconception I could have more time if I used my aide to provide teaching minutes that could not be met by the SPED teacher. This, however, is beyond the scope of duties allowed by Michigan law. The findings from the Investigation substantiated

TCAPS using the paraprofessionals illegally. This state Investigation also found Traverse City was in violation of rules, [300.323(c) (2) and Rule 340.1749 a (2) (a)], stating "when the teacher was unable to provide direct instruction to SPED students because the district had assigned the SPED teacher simultaneously to provide direct instruction in a GE Reading 180 program in another classroom". This investigation took place 6 months after I was coerced into resigning. This Investigation demonstrates how the Traverse City Public Schools were continuing to break laws and refusing to follow procedures for the special education students and special education teachers. This older teacher is no longer with the district.

Robert Peters states as a "concern" dated October 5, 2006 that I did not have prepared a "behavior plan" completed for EI students. Peters is referring to one of my students (KM). Peters never asked me to do a contingency plan for this student or for any other student during the entire time I was at Blair. My experience has been that these are done by the principal.

Peters lists as a "concern" dated October 5, 2006 that I used an incorrect form. In fact, in October, I needed as assessment for an occupational therapy student and asked Robert Saunders what form to use. He told me to use the one in the file cabinet. Later I found out that the district had recently adopted a new form. Peters said nothing to me about this all the time. This pretext only came up in February of 2007. He did not write me a note as he stated nor was this outside of this student's IEP.

His various "concerns" with IEPs has been addressed, above.

The October and November 2006 "concerns" relating to placement, scheduling, IEPs, service time to students were all caused by the rescheduling burden placed on the students and me by the READ 180 program initiated unlawfully by Peters (see above). My students were in a state of confusion and crisis after schedules changed October 2, 2006. My job was to take care of the needs to my struggling children. I was not receiving support from the principal at this time when the students would act out and need office behavior support, or I needed his support with least restrictive environment with PP, or I needed support to test my students in a quiet environment. After READ 180, the upper grades (4th, 5th, 6th ) needed to send students to me in the morning to fit their schedules. This change impacted the younger students learning times in the a.m. The room was small. There was a big 6th grader who was defiant and abusive that now had to come to the morning class. This student was abusive to an autistic child in that class. I contacted the mother and told her that he should not be in this classroom and that the minutes would be made up She was very appreciative and cooperative.

I advised Robert Peters that rescheduling was going to be difficult because the older students were now in classes with younger children. I assured him I was talking to parents and keeping track of any minutes. Parents of the younger students were very appreciative of my concern and my many contacts during this time to provide a safe and appropriate time for their child to come into the classroom. Many of the students could not handle the change. He was indifferent to student

needs, progress with curriculum, safety, behaviors and accommodating general education teachers' schedules. My principal did not care about any consultation to help my students.

In regard to another situation a student moved to Michigan from California, where he was enrolled as a full time self-contained SPED program in Calif. The full-time program was the only program offered SPED students at the Calif. school. In his IEP were reading, math goals, and high minutes. In the MET (psychologist testing) it was determined that PP was at grade level for math. I met with Diane Morris (English as second Language teacher) at out school to go over PP's MET. As I understand Jody Scott (4th grade teacher) went to Peters and wanted PP out of her classroom for math because of math goals written. I understood Jody, however I was undermined by Robert Peters because he never came to me directly with Jody's concerns. This information was purposely kept from me until the last minute when I understood the confusion. I could have solved the problem, dealt with Jody directly, and avoided the "Staffing" dilemma Robert Peters was furious with me when I told him PP was on grade level for math with his MET scores and that Diane Morris our ESL teacher was adamant that he stay in general education. He told me I was not meeting minutes. I tried to explain Least Restrictive, the MET report, the self-contained school he came from in Calif., the psychologist recommendation that PP not be removed from general education math. Peters did not care. He told me to put PP in my classroom for 795 minutes. This was clearly not "Least Restrictive" for my student. I called the ESL Director, Kathy Stranton to inform her of Peters; unreasonable demand. We had a meeting (staffing) to discuss the

issues surrounding PP. The Team agreed that PP needed to be in GE math. I did my job. I was written up for advocating least restrictive environment for my student which is mandated by law. Other teachers were not.

Another example of rescheduling a student after Read 180 is KW; her IEP was tabled. I had been trying to get KW's current IEP for 3 weeks. Ms. Marj Middel (SSW) notified me that she had an incomplete file and "Missing Current IEP". I spoke with the administration to help find (they use a program called "ROSRS") and they could not find the it. I expressed concern to Ms. Susan Haughn, a SPED specialist and part of the IEP team, asking for direction. Ms. Haughn volunteered to try to find the missing paperwork since she is at the ISD once a week. The meeting was set for the 10/26/2006 IEP. I went ahead with KW's IEP; knowing I would table the IEP. I felt that this Level 3 behavior (severe) student would probably need more than one meeting to build a good PLAN/PROGRAM for her. I was glad I did hold the IEP because I was able to meet the tribe Social Worker (Kathy Garza) who was a wonderful support KW. On October 26, we started the work to put KW (and the family) on a program with the homework books. Kathy Garza saw the parents daily that first 2 weeks to check to make sure KW was following the book. The mother and father were both expected to work with KW nightly. KW responded well. KW's IEP was rescheduled for November 14. The entire Team was in attendance. KW's behaviors had improved dramatically. The Team went from 750-825 minutes per week to 450-600 minutes per week because there was progress with behaviors and academics. After Read 180, KW had to be protected from the older students coming during her

scheduled time with me. The tribe social worker was contacted, as well as the parents. KW was highly reactive to the 6th grade bully. Safety and learning was compromised at this time. The general education teacher completely changed her language arts time to the afternoon to accommodate for her high minute, level 3 behavior students coming to me. Schedules settled down once this took place. Robert Peters wrote me up because of the change in minutes for KW; misrepresenting the truth about this student and all that went into the IEP, the TEAM work and the progress that K W made.

After READ 180, rescheduling was very extremely difficult for the struggling students, the 12 teachers, whose schedules were set from the beginning of the year. Robert Peters was using this time to look for any little things that I might be able to use against me. Because of level 3 severe behavior students, the Behavior Specialist was brought to the building. Level 3 students are provided this behavior support from the SPED department. This support was not exclusive to me. The behavior assistant, Ms. Lori Kalena, was assigned to assist with the three Level 3 students at Blair. Ms. Kalena reported, November 2006, "The room is too small. There are too many students. You have so many students at different levels with behavior needs. You do not have the support you need. More aide time is needed with KM's high minutes and DS behavior needs". Ms. Kalena returned in the spring to say "Hi" and see how I was doing. I told her Bob Peters wrote down that I had received 23 support visits from TBA. She was astonished, and said, "Susan, you did not have more than 6-8 support visits". She was happy to see a normal caseload at this time. She wondered how I survived the fall.

In addition, in November of 2006 guest teacher, Ms. Susan Summers, completed a Daily Substitute Teacher Report to Robert Peters. Ms. Summers reported, "Too many students at a time, too many students requiring one-on-one due to LD or behavior issues or both, too quick turn key, too few teachers!!!!!!! ..... and there were 3 of us !!!!????" Ms. Summers concluded by saying, "I worked as a teacher's aide in an Emotionally Impaired Learning Disabled classroom ... (for 2 years) and feel that this classroom requires 2 fully certified teachers and 2 full-time aides. . . . AT LEAST!)." Robert Peters called me into his office the next morning (as I walked into school). He told me he did not like my guest teacher the day before. I thought the comment strange until I saw the write up on my desk.

When the general education teacher mentioned above volunteered to move her language arts to the afternoon (not easy for her) everything minutes per week. Schedules were appropriate and behaviors settled down. Peters did not care to see how hard I was working, the GE staff was working to make things right for the students. Peters "watched" and "listened" for any slight error of minutes to "peg" me for his documentation. I was shocked to read all Peters nit-picking documentation used against me. He was denying these students support, denying me support, and using this time against the students and me. Peters was assigning me to work with students and other personnel during my lunch hour and planning period. At the time that he was complaining that IEP schedules were not met, we were re-working schedules (sometimes 3 times), consulting with 14 teachers, social workers, behavior specialists, speech, OT, PT and all the parents, and in addition to accommodating the specific needs of these special education students

and their "appropriate curriculum, environment and learning groups. He gave "minimum effort" to me or the students to help right-a-wrong not caused by me or my students It was administration's choice to ignore special education; even when the Read 180 grant director, Ms. Terry Sheldon who brought READ 180 to Blair was specifically told how to "legally use" the SPED teacher to teach in this reading intervention program but she ignored this directive. (See Exhibit D)

**G. Plaintiff Was Held to a Higher Standard Than Other Teachers. Robert Peters** suggests that one of the reasons for my termination was that my IEPs were late, however, this is common and unavoidable. For example:

1. Teacher Consultant, Michelle Thomas held an IEPC meeting which was 39 days overdue for (H.E) Another students D.U was overdue by 21 days. Both were signed by Robert Peters. On another occasion.

2. Special Education teacher, Robert Saunders, was 14 days overdue (M.O.) on an IEP due Dec. 4, 2006, held January 4, 2007. This was 14 days overdue, and signed by Robert Peters;

3. Special Education school social worker (SSW) Susan Haughn failed to provide me with student goals. objectives, present levels, prior to a IEP Team Meeting, as required. Ms. Haughn was sent a formal invitation, we discussed ahead of time the up coming IEP, she was called the day before and the day of the IEP as a final reminder. Ms. Haughn's goals, objectives, and report of progress were not turned in. Robert Peters would not allow me to "Table" this IEP due to her missing reports. I wrote "Tabled" across the top of the

IEP, but Mr. Peters instructed me to white out "Tabled". I wanted to "Table" the IEP because the required reports were not available. While away from my classroom the following day, Mr. Peters supported Ms. Haughn going into my private cupboard and altering the IEP. I reported this to the supervisor of special education in a letter. I shared his information with Marie Collins Gilmore, the assistant superintendent of special education at the ISD, August 2007. Ms. Gilmore said Ms. Haughn was procedurally incorrect.

4. Robert Peters charged me with violating FERPA (a law requiring secrecy as to certain student records) for bringing my student's Behavior Plan into the lounge. My 6th grade student DS had pushed and hit his sixth grade teacher, Ms. Danielle Brostrum. I walked into the lounge to find Ms. Brostrom extremely upset and surrounded by other teachers: Ms. Pierson, Ms. Domine, and others. The teachers were talking about filing a complaint against my 6th grade student, DS. Not wanting to have any procedural mistakes, I went to get DS's Behavior Plan to make sure DS was where he should be at the time of the incident and that the Plan had been followed. FERPA allows teachers to discuss a child with "other school officials including teachers within the educational institution or local educational agency in relation to the goal of educating the child." I had to review the Plan with people involved to confirm DS's Plan was followed. I did my job to make sure that correct procedures had been adhered to protect the school and teachers who had a right to file this complaint. None of these teachers were written up and/or reprimanded for using a student name, and reviewing a behavior plan in the lounge with people who needed to know.

5. Finally, Robert Peters failed to attend 3 IEP meetings without having first obtained pre-approval by the Supervisor or Director of Special Education. He is part or the IEP team and is required to attend. He then misrepresented that he was in attendance.

In summary, the so-called "concerns" are a pretext. Peters judged me differently than other teachers, specialists, and himself.

**Departmentalization**

Defendants are now justifying my unlawful caseload and class sizes based on "departmentalization". This pretext is after the fact Obviously, if this were the case it would have been in my employee file. Further, each of the IEPs for all of my special education students has a box indicating whether there is departmentalization. All of the IEPs state that the classes are not departmentalized. These IEPs are all signed by Robert Peters.

Tom Freeman from the Department of Education Compliance Office advised me that "Few (if any) elementary schools in the state of Michigan are departmentalized. It is a major program change and must be checked legally on page 6". A SPED departmentalized program must be set up with the correct number of teachers to support the program and must benefit the students (substantive and procedurally). Departmentalization is used at a high school level, where one teacher might teach math all day (algebra; basic, advanced, and the other teacher, teaches all reading, literature classes). It is done this way to have less lesson planning, to be able to be more efficient. Elementary students cannot handle changing

teachers every hour. Emotionally the elementary multi-disabled and multi age levels special education students cannot handle different teachers every hour with different rules and directions; moving to different classes.

By law I was not to have more than 12 SPED students at one time; I had 15 SPED students in a given hour, and at times 16.

The first and only time that I was advised that we had been "departmentalized" was an email from Robert Peters after READ 180 program was cancelled.

/s/ Susan M. Fox
Susan M. Fox, Affiant

STATE OF MICHIGAN )
) ss.
COUNTY OF MIDLAND )

On this 4th day of March, 2009. before me, a Notary Public acting in and for said County and State, personally appeared the above-named Susan M. Fox, who, being duly sworn, depose and says that she has read the foregoing instrument, by her subscribed and knows the contents thereof and that the same is true of her own information and belief, and as to those matters she believes it to be true.

/s/
Notary Public
County, Michigan

My Commission Expires: June 7, 2013

[seal]